Affin Bank Bhd v MMJ Exchange Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1712 OF 2007
MARY LIM J
8 APRIL 2011

Banking — Banker and customer — Duty of banker — Banker's cheques issued pursuant to remittance forms contained forged signatures of authorised signatories — Claim to recover monies paid under mistake — Whether plaintiff had locus standi to commence action — Whether plaintiff under duty to inform first defendant true state of account between them — Whether plaintiff negligent — Whether first defendant innocent bystander — Whether plaintiff proved case on balance of probabilities

Contract — Mistake — Mistake of fact — Claim to recover monies paid under mistake — Payments made pursuant to forged documents perpetrated by fraud — Whether there was contractual nexus between plaintiff bank and first defendant — Whether plaintiff had locus standi to commence action — Whether monies were paid under mistake of fact — Whether first defendant recipient had to return monies paid under mistake

MMJ Exchange Sdn Bhd ('the first defendant') was at all material times a money changer licensed under the Money-Changing Act 1998 ('the 1998 Act'). The transactions under scrutiny in the present case were those carried out by the first defendant and another licensed money changer known as Pyramid Triways Sdn Bhd ('PTSB'). When PTSB was approached by a customer one Leong Yong Kheng ('Leong') who had wanted to purchase RM150,000 worth of Singapore dollars, it did not have the substantial amount required by Leong. PTSB had then contacted the first defendant, whom it dealt with regularly, about exchanging RM150,000 worth of Singapore dollars. After the first defendant and PTSB had agreed on the rates, the former had asked PTSB to bank in the requisite sum into its bank account. This was allegedly a safer mode of transacting, which had been adopted by both the money changing companies in the past. PTSB later informed the first defendant that RM144,350 ('the first banker's cheque') had been paid into the latter's bank account and that the remaining RM5,650 would be paid in cash by the customer when he collected the RM150,000 worth of Singapore dollars. After the first defendant obtained verification that the relevant payment had been made into its account it arranged for PTSB to collect the RM150,000 worth of Singapore dollars. However, PTSB placed further orders for Euros and Singapore dollars to the total value of RM185,630 for its customer Leong and

requested to collect all the currencies at the same time. The process of payment for this latest exchange purchase into the first defendant's account was then repeated and after the first defendant had verified that the sum of RM185,630 ('the second banker's cheque') had been paid into its account, it arranged for the Euros and Singapore dollars to be sent to PTSB. Leong collected both these exchange purchases from PTSB. Thereafter, PTSB placed another order for Singapore dollars to the value of RM172,770 on Leong's behalf and made similar arrangements for the payment to the first defendant's bank account. However, in this case the first defendant informed PTSB that the cheque for the sum of RM172,770 had been stopped and PTSB claimed that it never saw Leong again. There were however, receipts for all the currency purchases issued by the first defendant to PTSB. In the meantime, the plaintiff bank had discovered that both the banker's cheques for RM144,350 and RM185,630 were issued pursuant to remittance forms, which contained the forged signatures of the authorised signatories of a company known as Xian Jiang Trading Sdn Bhd ('Xian Jiang'). When the plaintiff discovered that Xian Jiang had not issued those remittance application forms, it made a police report and returned those two sums into Xian Jiang's account. The plaintiff then pursued the current action against the first defendant in order to recover the same. It was the plaintiff's case, inter alia, that the first defendant did not receive the monies in good faith and was not a bona fide party; that the two payments were made pursuant to forged documents and perpetrated by fraud; that the monies were paid under a mistake of fact; and that the present case involved the recovery of money had and received. The plaintiff submitted that the first defendant's transactions with PTSB contravened the provisions of the 1998 Act because the payments for the currency exchange purchases used banker's cheques paid into the first defendant's account when only 'hard cash' transactions were recognised by the 1998 Act. The plaintiff relied on the information displayed by Bank Negara on its website to interpret the provisions of the 1998 Act. In response the defendant submitted that the modus operandi of Leong was to choose money changers' accounts to siphon off Xian Jiang's money but that this did not mean that the first defendant was complicit or involved in the alleged forgery. The first defendant also submitted that it had neither met Leong, who was at all material times the customer of PTSB, nor had any dealings with Xian Jiang. It was the first defendant's defence that it was just an innocent recipient through which money passed to the real culprit and that it had received no benefit from the transaction. By way of a preliminary issue, the first defendant challenged the locus standi of the plaintiff in bringing the present action and contended that there was no contractual nexus between the plaintiff and the first defendant.

Held, allowing the plaintiff's claim with costs:

(1) On the facts and the applicable law it was found that the plaintiff had the necessary locus standi to initiate and maintain this claim. There was clear

cogent evidence from the plaintiff's witnesses that the plaintiff had credited the sums into Xian Jiang's account following the realisation of what had happened (see para 4).

(2) The court was not convinced that all exchange transactions had to be executed in hard cash as set out in the Bank Negara website. No officer from the relevant department at Bank Negara was called to explain the operations and monitoring of money changing in the country. In any case, the arrangements in the present case used banker's cheques, which were as good as cash. As such, the contention of the plaintiff that the transactions should be in hard cash was without basis and ought to be totally disregarded (see paras 26 & 28).

(3) After carefully scrutinising and weighing the facts and evidence it was found that there were serious concerns as to the way PTSB conducted the relevant transactions. However, this was insufficient to construe collusion or mala fides on the part of the first defendant with PTSB, particularly since the first defendant's dealings were with PTSB and not with Leong and Leong's dealings were with PTSB and not with the first defendant. Be that as it may, the first defendant could not be regarded as a mere conduit or innocent bystander unaware of the happenings at PTSB's end. The first defendant was a party to transactions which were very much part and parcel of its business existence and it certainly derived some benefit, in that it received payment for the transaction. Further, to allow the first defendant to retain the monies which were paid by Xian Jiang, when the latter played no part in the transactions and had no obligation to pay the first defendant, amounted to an unjust enrichment. Since the monies were paid into the first defendant's account under the influence of a mistake and upon the supposition that Xian Jiang intended the first defendant to be paid, it was clear that had the true facts been known such payment would not have been made. Xian Jiang was not the first defendant's customer and there was no reason for Xian Jiang to be paying the first defendant any money. In such circumstances, those monies paid may be recovered (see paras 40–41 & 43).

(4) The plaintiff was not under a duty to inform the first defendant as to the true state of the account between them since the first defendant was not its customer. Further, the mere fact that the plaintiff paid on a forged form did not imply any representation that the form was genuine or that the plaintiff was negligent. In the circumstances, the first defendant was not entitled to retain the monies mistakenly paid into its account and the plaintiff was entitled to a repayment of those monies (see paras 44–45).

(5) Since neither Xian Jiang nor the plaintiff had ever intended the first defendant to keep nor use the monies received, which was not the first defendant's in the first place, the first defendant must return those monies

to Xian Jiang or to the plaintiff. The plaintiff had proved its case on a balance of probabilities. (see paras 47–48)

[Bahasa Malaysia summary

MMJ Exchange Sdn Bhd ('defendan pertama') adalah pada setiap masa matan pengurup wang berlesen di bawah Akta Pengurupan Wang 1998 ('Akta 1998'). Transaksi-transaksi di bawah penelitian kes ini adalah yang telah dijalankan oleh defendan pertama dan satu lagi pengurup wang berlesen yang dikenali sebagai Pyramid Triways Sdn Bhd ('PTSB'). Apabila PTSB didatangi seorang pelanggan bernama Leong Yong Kheng ('Leong') yang ingin membeli RM150,000 nilai matawang dolar Singapura, ia tidak mempunyai jumlah yang diperlukan oleh Leong. PTSB kemudian telah menghubungi defendan pertama, yang biasa berurusan dengannya, tentang pertukaran RM150,000 nila matawang dolar Singapura tersebut. Setelah defendan pertama dan PTSB bersetuju berhubung kadar, defendan pertama meminta PTSB memasukkan jumlah yang dikehendaki ke dalam akaun banknya. Ini dikatakan cara lebih selamat membuat pemindahan, yang telah digunakan oleh kedua-dua syarikat pengurup wang sebelum ini. PTSB kemudian telah memaklumkan defendan pertama bahawa RM144,350 ('cek bank pertama') telah dibayar ke dalam akaun bank defendan pertama dan baki RM5,650 akan dibayar secara tunai oleh pelanggan apabila dia mengambil RM150,000 nilai matawang dolar Singapura tersebut. Setelah defendan pertama mendapatkan pengesahan bahawa bayaran berkaitan telah dimasukkan ke dalam akaunnya ia telah mengatur agar PTSB mengambil RM150,000 nilai matawang dolar Singapura tersebut. Walau bagaimanapun, PTSB telah meletakkan permintaan selanjutnya untuk dolar Eropah dan Singapura yang berjumlah keseluruhan RM185,630 untuk pelanggannya Leong dan meminta agar semua matawang itu diambil pada masa yang sama. Proses bayaran pertukaran belian terkini ini ke dalam akaun defendan pertama kemudian diulangi dan selepas defendan pertama mengesahkan bahawa jumlah RM185,630 ('cek bank kedua') telah dibayar ke dalam akaunnya, ia telah mengatur agar dolar Eropah dan Singapura itu dihantar kepada PTSB. Leong telah mengambil kedua-dua pertukaran belian berikut daripada PTSB. Berikutan itu, PTSB telah meletakkan satu lagi permintaan untuk dolar Singapura bernilai RM172,770 bagi pihak Leong dan telah membuat urusan sama untuk bayaran ke akaun bank defendan pertama. Walau bagaimanapun, dalam kes ini defendan pertama telah memberitahu PTSB bahawa cek untuk jumlah RM172,770 telah disekat dan PTSB mendakwa bahawa ia tidak lagi bertemu Leong selepas itu. Namun begitu, terdapat resit-resit untuk semua belian matawang tersebut yang dikeluarkan oleh defendan pertama kepada PTSB. Sementara itu, plaintif bank mendapati bahawa kedua-dua cek bank untuk RM144,350 dan RM185,630 telah dikeluarkan menurut borang kiriman wang, yang mengandungi tandatangan palsu penandatangan yang diberi kuasa sebuah syarikat dikenali sebagai Xian Jiang Trading Sdn Bhd ('Xian Jiang'). Apabila plaintif mendapati Xian Jiang tidak mengeluarkan borang-borang

permohonan kiriman wang tersebut, ia telah membuat laporan polis dan mengembalikan kedua-dua jumlah tersebut ke dalam akaun Xian Jiang. Plaintif kemudian memulakan tindakan ini terhadap defendan pertama bagi tujuan mendapat balik yang sama. Adalah kes plaintif, antara lain, bahawa defendan pertama tidak menerima wang secara niat baik dan bukan pihak bona fide; bahawa dua bayaran tersebut telah dibuat melalui dokumen-dokumen palsu dan dilakukan melalui fraud; bahawa wang tersebut telah dibayar di bawah satu kesilapan fakta; dan bahawa kes ini melibatkan pengembalian wang yang ada dan diterima. Plaintif berhujah bahawa transaksi-transaksi defendan pertama dengan PTSB bertentangan dengan peruntukan-peruntukan Akta 1998 kerana bayaran-bayaran untuk belian pertukaran matawang menggunakan cek-cek bank yang dibayar ke dalam akaun defendan pertama walhal hanya transaksi-transaksi 'hard cash' diperuntukkan oleh Akta 1998. Plaintif bergantung kepada maklumat yang dipaparkan oleh Bank Negara dalam laman webnya untuk mentafsir peruntukan-peruntukan Akta 1998. Sebagai jawapan defendan berhujah bahawa modus operandi Leong adalah untuk memilih akaun-akaun pengurup wang bagi mengalihkan wang Xian Jiang tetapi ini tidak bermakna bahawa defendan pertama bersubahat atau terlibat dalam pemalsuan yang dikatakan itu. Defendan pertama juga berhujah bahawa ia tidak pernah bertemu dengan Leong, yang pada setiap masa matan pelanggan PTSB, mahupun telah berurusan apa-apa dengan Xian Jiang. Adalah pembelaan defendan pertama bahawa ia hanya penerima tidak bersalah di mana wang dipindahkan kepada pelaku salah sebenar dan bahawa ia tidak mendapat apa-apa manfaat daripada transaksi tersebut. Melalui isu awalan, defendan pertama mencabar locus standi plaintif yang memulakan tindakan ini dan berhujah bahawa tiada kaitan kontraktual antara plaintif dan defendan pertama.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Berdasarkan fakta dan undang-undang terpakai adalah didapati bahawa plaintif mempunyai locus standi untuk memulakan dan mengekalkan tuntutan ini. Terdapat bukti yang jelas daripada saksi-saksi plaintif bahawa plaintif telah memasukkan jumlah wang tersebut ke dalam akaun Xian Jiang berikutan kesedaran tentang apa yang telah berlaku (lihat perenggan 4).

(2) Mahkamah tidak yakin bahawa semua transaksi pengurupan telah dilaksanakan dalam bentuk wang tunai sepertimana ditetapkan dalam laman web Bank Negara. Tiada pegawai daripada jabatan berkaitan di Bank Negara telah dipanggil untuk menjelaskan operasi dan pengawalan pengurupan wang dalam negara. Dalam apa keadaan, urusan-urusan dalam kes ini menggunakan cek bank, yang mana adalah sebaik wang tunai. Oleh itu, penegasan plaintif bahawa transaksi-transaksi tersebut patut dilakukan secara wang tunai adalah tidak berasas dan tidak patut diambil kira langsung (lihat perenggan 26 & 28).

(3) Setelah meneliti dan mengimbangi fakta dan keterangan, adalah didapati bahawa terdapat keprihatinan berhubung cara PTSB mengendalikan transaksi-transaksi berkaitan. Walau bagaimanapun, ini tidak mencukupi untuk mentafsir pakatan sulit atau mala fide di pihak defendan pertama dengan PTSB, khususnya memandangkan urusan defendan pertama adalah dengan PTSB dan bukan Leong dan urusan Leong adalah dengan PTSB dan bukan dengan defendan pertama. Jika demikian, defendan pertama tidak boleh dianggap sebagai penghubung semata-mata atau pemerhati yang tidak bersalah yang tidak sedar tentang apa-apa yang berlaku di pihak PTSB. Defendan pertama merupakan pihak kepada transaksi-transaksi yang merupakan sebahagian besar daripada kewujudan perniagaannya dan sememangnya ia mendapat manfaat, di mana ia telah menerima bayaran untuk transaksi tersebut. Selanjutnya, untuk membenarkan defendan pertama menyimpan wang yang dibayar oleh Xian Jiang, walhal dia tiada peranan dalam transaksi tersebut dan tiada obligasi untuk membayar kepada defendan pertama, membentuk pengayaan yang tidak adil. Oleh kerana wang tersebut telah dibayar ke dalam akaun defendan pertama di bawah pengaruh kesilapan dan dengan andaian bahawa Xian Jiang mempunyai niat agar defendan pertama dibayar, adalah jelas bahawa jika fakta sebenar diketahui maka bayaran tersebut tidak mungkin dibuat. Xian Jiang bukan pelanggan defendan pertama dan tiada sebab untuk Xian Jiang membayar defendan pertama apa-apa wang. Dalam keadaan sedemikian, wang yang dibayar tersebut boleh dikembalikan (lihat perenggan 40–41 & 43).

(4) Plaintif tidak mempunyai kewajipan untuk memberitahu defendan pertama berhubung keadaan kewangan sebenar antara mereka kerana defendan pertama bukan pelanggannya. Selanjutnya, fakta bahawa plaintif telah membuat bayaran atas borang yang dipalsukan tidak menandakan apa-apa representasi bahawa borang itu adalah yang tulen atau bahawa plaintif adalah cuai. Dalam keadaan berikut, defendan pertama tidak berhak menyimpan wang yang telah silap dibayar ke dalam akaunnya dan plaintif berhak mendapat bayaran balik wang tersebut (lihat perenggan 44–45).

(5) Oleh sebab Xian Jiang mahupun plaintif tidak berniat untuk defendan pertama menyimpan atau menggunakan wang yang diterima, yang bukan milik defendan pertama pada mulanya, defendan pertama hendaklah mengembalikan wang tersebut kepada Xian Jiang ataupun kepada plaintif. Plaintif telah membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 47–48).]

Notes

For cases on banker and customer, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2114–2122.

For cases on mistake of fact, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5279–5289.

Cases referred to

Abdul Rashid bin Maidin & Ors v Lian Mong Yee [2008] 1 MLJ 469, CA (refd)
Bank Bumiputera (M) Bhd v Hashbudin bin Hashim [1998] 3 MLJ 262, HC (refd)
Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd and another [1980] 1 QB 677 (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356; [1990] 1 CLJ (Rep) 57, SC (refd)
Cocks v Masterman (1829) 9 B & C 902 (not folld)
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (refd)
Hasmah bt Abdul Rahaman v Kenny Chua Kien Lam [2006] MLJU 153, CA (refd)
Imperial Bank of Canada v Bank of Hamilton [1903] AC 49, PC (refd)
Kelly v Solari (1841) 9 M & W 64 (refd)
Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, HL (refd)
National Westminster Bank Ltd v Barclays Bank International Ltd and another [1974] 3 All ER 834 (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57, SC (refd)
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2004] 6 MLJ 1, HC (refd)
The London and River Plate Bank, Limited v The Bank of Liverpool, Limited, and others [1896] 1 QB 7 (not folld)
United Bank of India v AT Ali Hussain & Co AIR 1978 Cal 169 (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 s 14, First Schedule, Second Schedule
Contracts Act 1950 s 73
Money-Changing Act 1998 ss 2, 4

CP Lee (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the plaintiff.
Loganathan Manickam (Ganendrah & Associates) for the first defendant.

Mary Lim J:

[1] The first defendant received two banker's cheques; one dated 3 August 2007 and bearing the sum of RM144,350, the other dated 9 August 2007 bearing the sum of RM185,630. Both cheques were issued pursuant to

remittance forms which contained forged signatures of the authorised signatories of a company known as Xian Jiang Trading Sdn Bhd ('Xian Jiang'). When the plaintiff discovered that Xian Jiang had not issued those remittance application forms, it made a police report; returned those two sums into Xian Jiang's account and, pursued the current action against the first defendant in order to recover the same. The plaintiff has premised its claim on several causes of action:

(a) that the first defendant did not receive the monies in good faith and was not a bona fides party;

(b) that there was no consideration from the first defendant to the plaintiff or to Xian Jiang or to the nominees or agent of the plaintiff or Xian Jiang;

(c) that the two payments were made pursuant to forged documents and perpetrated by fraud;

(d) that the monies were paid under a mistake of fact; and

(e) recovery of money had and received.

LOCUS STANDI OF THE PLAINTIFF

[2] By way of a preliminary issue, the first defendant challenged the locus standi of the plaintiff in bringing the present action. Mr Loganathan Manickam, learned counsel for the first defendant contended that the plaintiff had neither the necessary locus standi to initiate nor to maintain this action. There was no contractual nexus between the plaintiff and the first defendant nor was there what was described as 'any trace of a 'tortuous' liability' pleaded against the first defendant. As mentioned earlier, the monies received by the first defendant were debited from the account of Xian Jiang, a third party. That being the case, it was argued that it would have made sense if this action was brought by Xian Jiang; but not where it was initiated by the plaintiff bank. There was also no evidence that the two sums had been credited into Xian Jiang's account. In the absence of any police investigation, handwriting expert's report, bank statement or any proof, the first defendant invited the court to conclude that Xian Jiang's account had not been credited at all. The plaintiff therefore did not suffer any loss for which it can initiate and maintain the present claim.

[3] Miss CP Lee, learned counsel for the plaintiff invited the court to disregard this issue because it was not pleaded. With respect, I disagree. This is an issue that can be addressed by the court regardless. In fact, the court must as it is an extremely important issue which affects the proper conduct of this action.

[4] On the facts and the applicable law, I find that the plaintiff has the

necessary locus standi to initiate and maintain this claim. There is clear cogent evidence from the plaintiff's witnesses that the plaintiff has credited the sums into Xian Jiang's account following the realisation of what had happened. The plaintiff had called six witnesses, three of whom were from Xian Jiang itself. They were Mr Chung Shan Kwang, Miss Lee Mee Hong, and Mr Tan Ton Heong.

[5] As the managing director of Xian Jiang, Mr Chung Shan Kwang ('PW2') was in charge of the day to day running of the company, including operations. He is the person who would give the necessary instructions and approvals for any banker's cheque applications that Xian Jiang may require. He instructs PW3, the person who actually handles the banker's cheque applications for Xian Jiang. It was PW2's testimony that he never gave instructions for the application of the banker's cheques in question; that the signatures on all the application forms were not his but were forged; that both Wong Yue Sie and Leong Yong Kheng were not Xian Jiang's employees; and that he did not know both gentlemen. These two persons had purportedly carried respective letters of authorisation dated 3 August 2007 and 9 August 2007 when dealing with the plaintiff. PW2 categorically denied that those letters were issued by Xian Jiang. In fact, Xian Jiang had no relationship with the first defendant, then or now, be it business or any other, for there to be any payment to the first defendant. He also does not know the first defendant. The position was the same with respect a company known as Pyramid Triways Sdn Bhd. PW2 further testified that since discovering the deductions from Xian Jiang's account, and protesting the same to the plaintiff vide letter dated 14 August 2007, the plaintiff had credited the two amounts into Xian Jiang's account.

[6] PW2's evidence was confirmed by both Miss Lee Mee Hong ('PW3') and Mr Tan Toh Heong ('PW4'). PW4 was another director of Xian Jiang. He was responsible for the management, administration and liaison of Xian Jiang. He, too, told the court that he had not instructed PW3 to apply for any banker's cheques to the first defendant as Xian Jiang had no relationship with the first defendant and he did not know the first defendant. He was also aware that their remittance application forms would usually be typed as opposed to be handwritten, as was the case here. He similarly denied that the signatures appearing in the forms were his. He also told the court that a demand for refund was made to the plaintiff and the bank paid 'after we have a discussion, meetings and together with our lawyers that happened after the incident was about 2 months after our discussion, the settlement'. He, too, confirmed that Xian Jiang's money had been credited back into its account by the plaintiff.

[7] As for PW3, she confirmed PW2's evidence. As Xian Jiang's accounts executive, her tasks included handling applications for banker's cheques for Xian Jiang. She told the court that she is the only person at Xian Jiang who

handles such applications. Her practice in respect of such applications was 'to type on the said application form. I do not write on the application form'. PW3 testified that PW2 did not instruct her to prepare any applications for banker's cheques at the material time; certainly not the ones under examination. She also testified that Xian Jiang made an average of one application per month for banker's cheques and such applications usually were for 'a few thousand only'. She also denied preparing the letters of authorisation presented by Wong Yue Sie and Leong Yong Kheng to the plaintiff. It was her evidence that such letters of authorisation were not necessary because Xian Jiang had already authorised one Mr Sugakumaran a/l Muniday and in his absence one Mr Selvakumaran a/l Kuppermuthu to collect Xian Jiang's banker's cheques. Both Mr Sugakumaran a/l Muniday and Mr Selvakumaran a/l Kuppermuthu were employees of Xian Jiang and their duties involved handling dispatch work. Upon being shown the relevant application forms, PW3 denied that these forms were completed by her. She was quite certain about this because the relevant forms tendered in court were completed by hand while according to her, she always typed in the details. In fact, it was precisely this single feature that alerted the plaintiff's employee, Puan Maizurah bt Hamzah in the first place to the discrepancy and the unearthing of the forgery subsequently.

[8] The first defendant sought to discredit these witnesses; in particular, PW1 and PW4 by suggesting that no payment had been made by the plaintiff and the parties had some 'kind of arrangement'. In my view, this is pure speculation on the part of the first defendant. It transpired that the plaintiff held discussions with Xian Jiang which culminated in a settlement agreement. In essence and for the purpose of this case, as explained by PW4, Xian Jiang agreed to 'co-operate with the bank in any event if they require us to be as a witness'. Hence, the reason for the presence of PW2, PW3 and PW4 in court to testify on behalf of the plaintiff. I do not find anything wrong with the arrangement or understanding reached between the plaintiff and these witnesses from Xian Jiang. It is a perfectly good and sound arrangement and nothing negative should be read into it. Even if there was no arrangement, these witnesses could easily have been subpoenaed. The arrangement or understanding simply avoids taking such a step. In any case, I find all three witnesses here truthful. From the stance and the submissions made by the first defendant, I find that the matter of the forged applications is not in serious contention. It is more of a given. The only issue is whether the first defendant has to refund the monies received for the reasons argued by the plaintiff.

[9] In any event, there is also the evidence of Puan Norshahrizan bt Abdullah ('PW6'), the manager of the plaintiff's main branch at the material time. She made a police report on 14 August 2007 after its customer, Xian Jiang complained that it never authorised the three remittances in question and that it never authorised 'Wong Yue Sie' and 'Leong Yong Kheng' to collect the

banker's cheques in question. In a second police report made shortly on 17 August 2007, she added that monies had been paid out to the defendants under two of three remittance applications. The third banker's cheque prepared on 14 August 2007 was stopped and cancelled after the plaintiff received direct instructions from Xian Jiang. PW6 also informed the court that the two amounts paid to the defendants have since been credited back into Xian Jiang's account.

[10] The plaintiff's act of crediting the relevant sums back to Xian Jiang is proper and reasonable given the circumstances. In any case, it is not the defendant's suggestion that the plaintiff should not have credited the monies back to Xian Jiang. Rather, the suggestion is — on a claim for money had and received; the plaintiff must prove that it is the plaintiff's money that was taken. Here, since it was Xian Jiang's account that was debited, it was Xian Jiang whose money was lost. With respect, I disagree. To me, for the reasons explained by the plaintiff, and with the evidence of PW6, PW2 and PW4, there is sufficient evidence before the court to prove that the plaintiff has the necessary locus standi to initiate and maintain this action.

THE TRANSACTIONS

[11] This is how the monies came to be paid into the first defendant's account. For this, I will have to recount the versions as offered by the plaintiff and the first defendant. In the case of the first defendant, I will have to set out the transactions as told by two money changers, the first defendant and another known as Pyramid Triways Sdn Bhd ('Pyramid Triways') as the payments concerned the transactions the two companies were involved in at the material time.

[12] At the material time, the first defendant was a money changer licensed under the Money-Changing Act 1998 ('Act 577'). Encik Mohamed Zafrulla bin D Abdul Rahim ('DW1') was the person who set up the first defendant. DW1 testified that he had been in the money changing business for more than 15 years. The transactions under scrutiny were those that the first defendant had with a company known as Pyramid Triways. Mohd Thameem Ali bin Syed Ibrahim ('DW3'), a director of Pyramid Triways informed the court that Pyramid Triways had been in the same business as the first defendant for the last five years. During this time, Pyramid Triways had approached the first defendant whenever it was short on foreign currencies with a view to buying such currencies from the first defendant. The first defendant is said to offer Pyramid Triways 'wholesale' prices for such purchases.

[13] This was Pyramid Triways' version of the transactions as told by DW3. He told the court that he was approached by one Mr Leong Yong Kheng on 3 August 2007 who, after inquiring about the exchange rate, purchased RM150,000 worth of Singapore dollars. Because the amount was substantial, DW3 said he made a photocopy of Leong's identity card and also took down Leong's handphone number. He then contacted DW1 for his exchange rates for Singapore dollars as he did not have the amount required by this Leong Yong Kheng ('Leong'). After negotiating with DW1, he agreed to purchase the Singapore dollars from DW1. DW3 then gave Leong the first defendant's name and account details so that Leong could make the requisite payment into the first defendant's account. According to DW3, this was the mode deployed when dealing with exchanges involving large sums. RM150,000 was considered a substantial amount by DW3. If a bank draft was used to pay for the purchase, a three day clearing period was required. After Leong had made the payment, he showed DW3 the bank in slip. But, since Leong had only banked in a sum of RM144,350 with the difference to be a cash payment at the time of collection, DW3 alerted DW1 by telephone of the same. After three days, DW1 telephoned DW3 to say that the cheque had cleared and that the sum of SD65,445 was ready for collection. DW3 accordingly contacted Leong at the number given. At which time, Leong supposedly requested for additional foreign currencies in Euros and Singapore dollars to the value of RM185,630. Leong further informed DW3 that he would collect all the currencies exchanged at one and the same time. The process of payment into the first defendant's account was then repeated. Again, after Leong had made the second payment and shown DW3 the bank in slip, DW3 telephoned DW1. On 13 August 2007, DW1 telephoned DW3 to inform him that the Euros and Singapore dollars required would be sent to DW3's shop that same afternoon. While waiting at DW3's shop for the exchanged currencies to be delivered, Leong is said to have told DW3 that he had one more cheque of RM172,770 to be exchanged into Singapore dollars. Again, DW3 followed the same procedure as recounted earlier in respect of this latest exchange purchase. When the currencies from the earlier two transactions were delivered by DW1's employees, Leong collected them and left. On 17 August 2007, DW1 telephoned DW3 to inform him that the cheque for the sum of RM172,770 had been stopped. According to DW3, Leong has never been seen again.

[14] This was DW1's version of those transactions. On 3 August 2007, DW3, a director of Pyramid Triways with whom he had done business before, telephoned him about exchanging RM150,000 worth of Singapore dollars. After DW1 and DW3 had agreed on the rates, DW1 asked DW3 to bank in the requisite sum into his account at Maybank. The parties had used this mode of transacting before and so DW3 knew DW1's banking details. According to DW1, it was safer to transact in this way whenever large sums were involved. In this way, cash or banker's cheques could be banked into its account directly. After payment had been made, DW3 telephoned DW1 to inform him that

only RM144,350 had been paid in whereas the balance of RM5,650 will be paid in cash. On 6 August 2007, Mohd Ariff bin Mohd Hussein ('DW2'), the first defendant's accounts assistant, who attends to such matters for DW1, went to the first defendant's bank at Maybank and obtained a copy of the daily print-out. The print-out verified that the relevant payment had been made. With this verification, DW1 arranged for DW3 to collect the RM150,000 worth of Singapore dollars. However, DW3 placed further orders for Euros and Singapore dollars to the total value of RM185,630 and requested to collect all the currencies at the same time. The process of payment for this latest exchange purchase into the first defendant's account was then repeated. After DW2 had obtained verification from the bank that the sum of RM185,630 had been paid into the first defendant's account at Maybank, DW1 arranged for the Euros and Singapore dollars to be sent to DW3 on 13 August 2007. After the currencies had been sent, DW3 placed another order for Singapore dollars to the value of RM172,770 and made similar arrangements for the payment to the first defendant. However, on 17 August 2007, DW2 returned from Maybank with news that the cheque for RM172,770 had been stopped. There are receipts for all these currency purchases issued by the first defendant to Pyramid Triways. DW1 has never met Leong/Wong and informed the court that he was not aware of the identity of Pyramid Triways' customer nor did he or the first defendant have any dealings with Xian Jiang.

[15] At the plaintiff's end, this was how the whole forgery was discovered. Puan Maizurah bt Hamzah ('PW5') was working as a customer support officer at the plaintiff's main branch in 2007. At that material time, her primary duty was to handle fixed deposits and occasionally, relieve other officers either during lunch time or when they are on leave. During this time, she handled transactions such as remittance payments and banker's cheque applications.

[16] At lunch time of 14 August 2007, PW5 was on relief duty. After the banker's cheque for RM172,770 had been issued, she noticed that the related remittance application form had been completed by hand instead of being type written, as was the usual practice of Xian Jiang. PW5 informed the court that she was familiar with Xian Jiang since it had been the plaintiff's customer since she joined the plaintiff in 1996. She said she then 'immediately' called Miss Lee Mee Hong (PW3), the contact person of Xian Jiang 'to verify the transaction'. PW5 was then informed by PW3 that 'Xian Jiang did not apply for remittance of banker's cheque for RM 172,770.00 to the 1st Defendant and Xian Jiang did not authorize Mr Leong Yong Kheng to do the banker's cheque for Xian Jiang. Ms Lee also told me that Xian Jiang had no dealings with the 1st Defendant'. She then faxed the relevant form to Xian Jiang for clarification and verification. After seeing them, PW3 informed PW5 that the signatures in the letter dated

14 August 2007 at P15 and the application form at P14 were forged and the person named therein 'Mr Leong Yong Kheng' was not an employee of Xian Jiang.

[17] Upon learning this, PW5 who by now had done some checking informed PW3 that there were two previous transactions all involving applications by Xian Jiang. The first was on 3 August 2007 for banker's cheques of RM87,520 in favour of the second defendant, and RM144,350 in favour of the first defendant. The second was on 9 August 2007 for banker's cheques of RM147,350 in favour of the second defendant, and RM185,630 in favour of the first defendant. She then faxed all the relevant documents to Xian Jiang. Once again, PW5 was told by PW3 that the signatures on the relevant documents were also forged, and the persons named in the documents, 'Wong Yue Sie' and 'Leong Yong Kheng' were not employees of Xian Jiang. Xian Jiang then sent a letter dated 14 August 2007 to the plaintiff wherein Xian Jiang categorically stated that it 'did not authorize remittance of banker's cheques for the sum of RM144,350.00 and RM185,630.00 in favour of the 1st Defendant'. Upon receipt of this letter, the plaintiff instructed that the relevant banker's cheques be cancelled and stopped.

ARE THE APPLICATION FORMS FORGED?

[18] This matter needs to be addressed and get out of the way so that the rest of the issues may be considered. Mr Harcharan Singh a/l Tara Singh ('PW1'), a forensic consultant specialising in the examination of handwriting and signatures gave evidence on the signatures found in the relevant (impugned) documents. He compared these signatures with those found in the originals of several documents belonging to Xian Jiang (standards). It was his opinion 'based on a conclusion reasonably ascertained by microscopic examination and observations reasoning and reasons, and based on my experience and knowledge as a forensic consultant' that the signatures in the impugned documents 'do not have common authorship' with the standards. In short, Xian Jiang's signatures were forged.

[19] I have carefully evaluated PW1's evidence, examined the line of cross-examination undertaken by the first defendant's counsel and considered learned counsel's submissions and as observed earlier, it is quite apparent that the issue of the relevant remittance forms being forged is not in serious dispute. In any case, from my observation, the relevant documents are clearly forged. It is however, not clear who forged these documents. It goes without saying that this Leong or Wong if indeed these are their real names, were not called. Be that as it may, for the purpose of this claim, the issue is whether the first defendant is implicit in the forgery or the larger scheme of things, so to speak and, whether it should return those monies to the plaintiff.

[20] Although somewhat obvious, I shall nevertheless put this on record to avoid any confusion and for better appreciation of the facts and deliberations. The plaintiff has withdrawn its action against the second defendant. With this, the references by the witnesses of both parties in relation to that defendant will naturally be ignored.

MONEY-CHANGING ACT 1998 (ACT 577)

[21] The plaintiff has invited this court to treat the first defendant's transactions with Pyramid Triways as described above as contravening the provisions of the Money-Changing Act 1998 (Act 577). The plaintiff says the payments for the currency exchange purchases under scrutiny using banker's cheques paid into the first defendant's account violates Act 577 which only envisages 'hard cash' transactions. Since the transactions are in violation of Act 577, the plaintiff submitted that the first defendant did not receive the monies in good faith and neither was it a bona fides party. No consideration was said to have flowed from the transactions and with the relevant documents proven as forged and perpetrated by fraud, the first defendant was obliged to return the monies in question to the plaintiff.

[22] Learned counsel relied on the information displayed by Bank Negara on its website as the source of this proposition. The precise information comes from Bank Negara's website. Under its 'FAQs' (frequently asked questions) the plaintiff sought to rely on the answers given in relation to two questions:

> 1. What is the permissible business scope of licensed money changers?
>
> Under the Money-Changing Act 1998, money changers are only allowed to exchange foreign currency against the ringgit or against other foreign currency, all in hard cash, within Malaysia.
>
> This also includes the buying of travelers' cheques.
>
> 4. Can I pay the licensed money changer to exchange my desired currencies in other payment instruments other than cash?
>
> No. Customers are only allowed to pay cash at the approved premises of the licensed money changers. Crediting payment into money changers' accounts is not allowed.
>
> All licensed money changers must conduct their transactions with their customers to exchange the currencies in hard cash only.

[23] This is a summary of the first defendant's response on these issues. Learned counsel suggested that from the circumstances of the transactions, particularly with Leong/Wong choosing to do the banker's cheque transactions at lunch-time when the bank's staff would be reduced, it would appear that the

modus operandi of Leong/Wong was to chose money changers accounts to siphon off Xian Jiang's money. This does not however mean or imply that the first defendant and DW3 are complicit or involved in the alleged forgery or scheme.

[24] In my judgment, while the court may take judicial notice of the existence of a website set up by Bank Negara, the Central Bank of Malaysia, in my view that would be the extent of that notice. Whether the contents of the website would be taken judicial notice of to the extent of binding the court is quite something altogether. When Abdul Malik Ishak J (as His Lordship then was) said in *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1 that he could take judicial notice of the website, of 'almost everything', His Lordship elaborated it was in respect:

> … of those matters which men of ordinary and average intelligence would be acquainted with (*Byrne v Londonderry Tramway Co* (1902) 2 IR 457 at p 480; *Loughney v Caledonian Rly Co* (1902) 39 SCLR 289; and *Hoare v Silverlock* (1848) 12 QB 624 at p 633). It is permissible for me to take judicial notice of how certain business are being carried out. It would not be out of place for me to take judicial notice of the following state of affairs:
>
> (a) as to the normal banking hours …;
>
> (b) as to how a broker would function at the stock exchange …;
>
> (c) as to the common practice of legal practitioners who specialise in conveyancing …; and
>
> (d) as to the risks peculiar to certain trades …
>
> Generally speaking, I can rely on my own knowledge of the local affairs (*Ingram v Percival* [1969] 1 QB 548; [1968] 3 All ER 657). Those who are computer literate would certainly log on to the website to garner knowledge and information. And this I can surely take judicial notice of.

[25] Here, the information under examination was not only obtained after close of evidence without the benefit of being put to the witnesses; this information pertains to the interpretations of the provisions of Act 577 and even then, it is provided under cover of a 'FAQ'. The court can take judicial notice that there is a section on FAQs in Bank Negara's website where answers are provided to those FAQs; and that one of those FAQs which happens to be of interest to the plaintiff here concerns the interpretation and operation of Act 577. That, however, is neither here nor there. The provider of the answer was not called to give evidence. In fact, the plaintiff had sent emails to the Director of Foreign Exchange Administration Department, Bank Negara which remained unanswered. It goes without saying that the task of interpreting Act

577 is surely one for the court and not Bank Negara. With respect, while their views may be offered for consideration, it is certainly, not in the least binding. These are the provisions of ss 2 and 4:

> 2. In this Act, unless the context otherwise requires —
>
> 'exchange transaction' means an exchange of one foreign currency with ringgit or with another foreign currency;
>
> 'foreign currency' means currency notes and coins which are legal tender in any territory outside Malaysia, excluding the foreign currencies set out in the First Schedule;
>
> 3. For the purposes of this Act, 'money changing business' means —
>
> (a) the business of entering into an exchange transaction at a rate of exchange;
>
> (b) the business of buying travelers' cheques at a rate of exchange; or
>
> (c) such other business as the Minister may prescribe.

[26] From these provisions, I am not convinced that all exchange transactions can only be executed in hard cash; and specifically, the exchange transactions practiced in the manner or form by the first defendant and Pyramid Triways, are unlawful. No officer from the relevant department at Bank Negara was called to explain the operations and monitoring of money changing in the country, the dos and don'ts, existence of guidelines and the like; the impact of non-compliance. In any case, the arrangements using banker's cheques are as good as cash.

[27] Aside from the above submissions, the plaintiff's counsel also offered evidence in the course of her submissions on the revocation of the first defendant's license under Act 557. She further contended that both the first defendant and Pyramid Triways either directly or indirectly facilitated and/or abetted the 'fraud' and/or 'forgery' which resulted in the payment of the monies into the first defendant's account. Learned counsel did not confine her arguments to the operations of Act 557 but extended it beyond the pale of the pleaded case. She raised arguments concerning Act 557 and Bank Negara's 'rulings' being efforts to 'inter alia' combat money laundering; that cheating and forgery are examples of money-laundering pursuant to the second Schedule of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. She took the view that since the first defendant and Pyramid Triways as money changers are 'reporting institutions' within the definition of the First Schedule of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, they are obliged under s 14 to, inter alia, promptly report to the competent authority suspicious transactions. The present transactions were said to be suspicious because the amounts of foreign currencies purchased were large; that Leong, a stranger never asked for any receipts or acknowledgments

from Pyramid Triways after paying in such large sums on 3 August 2007 and 9 August 2007; when the foreign currencies were ready for collection, Leong purportedly opted to defer collection and proceeded to make a further substantial purchase of foreign currency, again without requiring any receipt or acknowledgment of payment. Relying on the Supreme Court decision in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ (Rep) 57, learned counsel contended that with the weight of such evidence, that DW1 and DW3 were 'dishonest and untruthful witnesses', the cumulative inference from all these facts suggested that the transactions were tainted with illegality and therefore void and unenforceable. The first defendant was not entitled to keep the sums received and as a party who is in pari delicto, it must accept that the loss lies where it falls — *Hasmah bt Abdul Rahaman v Kenny Chua Kien Lam* [2006] MLJU 153; *Abdul Rashid bin Maidin & Ors v Lian Mong Yee* [2008] 1 MLJ 469. The first defendant was then expected to purge the gains and return the same to the plaintiff.

[28] With respect to learned counsel, there is almost a death defying quantum leap from the primary allegations which found the cause of action of the plaintiff to the extensive arguments now launched on what is suggested to be the platform of illegality. And, in that void is the cross-over from civil liability to criminal liability. Quite apart from the absence of firm evidence and even more worrying where the matters alleged were not even offered to the relevant witnesses in the course of examination of those witnesses with counsel offering evidence from the Bar, I am not in the least prepared to say that there have been violations of Act 557 to the extent of rendering the transactions illegal. This is dangerous and strikes at the heart of justice and fairness. In fact, as discussed earlier, the contention of the plaintiff that the transactions can and must necessarily be in hard cash is without basis. The engagement, if at all, of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 was never pleaded nor put to the witnesses. Of greater concern is the fact that what is under consideration are allegations of criminal violations of the Act where charges against particular persons need to be preferred, and the burden of proof is entirely different from the causes of action under scrutiny here. Neither the court nor the parties are here for that exercise. These matters are therefore totally disregarded.

MISTAKE OF FACT

[29] The plaintiff has further relied on s 73 of the Contracts Act 1950 that monies paid under a mistake of fact must repay or return those monies. Section 73 reads as follow:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

[30] The argument here is that the plaintiff made the payment upon the honest assumption that it was a genuine application from Xian Jiang to the first defendant; that the payment was authorised by Xian Jiang. This was obviously a mistake as these two entities have no relationship with each other as confirmed by the witnesses from Xian Jiang, and from the first defendant, DW1 and DW3. Aside from that, being forged remittance application forms, the lack of authorisation is proved. Since the word 'must' which is a stronger word than 'shall' is used in s 73, then where the existence of a mistake has been proved, it was contended that the first defendant must comply and return the monies (see *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149).

[31] The first defendant submitted that while s 73 mandates the return of money paid under a mistake, it is not in every case that recovery is ordered. There may be particular cases where the plaintiff is disentitled from asking for the return, be it by reason of estoppel or otherwise as was reminded in *United Bank of India v AT Ali Hussain & Co* AIR 1978 Cal 169:

> It is not correct to say that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitles a plaintiff by estoppel or otherwise …
>
> It is difficult to lay down the circumstances under which a plaintiff may be held to be debarred from recovering the money which he had paid under a mistake, but if the circumstances be construed as falling within the purview of the doctrine of estoppel or are such that it would be inequitable to allow the plaintiff to recover, the plaintiff must fail.
>
> So long as the status quo is maintained and the payee has not changed his position to his detriment he must repay the money back to the payer. If, however, there has been a change in the position of the payee who, acting in good faith, parts with the money to another without any benefit to himself before the mistake is detected, he cannot be held liable. Equity disfavours unjust enrichment. When there is no question of unjust enrichment of the payee by reaping the benefit of an 'accidental windfall' he should not be made to suffer, for he would be as innocent as the payer who paid the money acting under a mistake.

[32] The first defendant also submitted that it was just an innocent recipient or 'conduit pipe' through which money passed to the real culprit and that no benefit had been received. It further claimed to have no knowledge of the scheme perpetrated by Leong/Wong. Therefore, the first defendant should not be held accountable where the money earlier received had been dissipated. The House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 similarly expressed its disfavor in ordering a return where injustice will result due to the change of position on the part of the innocent third party:

> … it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays the money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these. The principle is recognised throughout the common law world.

[33] Further, as far back as 1829, in *Cocks v Masterman* (1829) 9 B & C 902, it was felt that a holder of a bill should not be deprived of any right or privilege by virtue of the negligence of the bankers who had paid under a mistake and ignorance of the fact that it was a forged acceptance. Such 'holder should be entitled to know, on the day when it becomes due whether it is an honoured or dishonoured bill, and the parties who paid it cannot recover it back'. Similar reservations were also expressed by Matthew J in *The London and River Plate Bank, Limited v The Bank of Liverpool, Limited, and others* [1896] 1 QB 7, 11, on whether money paid under a mistake of fact could be recovered:

> If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business.

[34] It is quite obvious that the position under s 73 of the Contracts Act 1950 is consistent with that under common law as established long ago in the case of *Kelly v Solari* (1841) 9 M & W 64. Parke B's short and clear dicta in *Kelly v Solari* was cited with approval by Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd and another* [1980] 1 QB 677 at p 687, that if money was paid under a mistake, it would be against good conscience to retain that money. Where there was no intention that the money should be retained once the truth is known regardless of there being want of due diligence, the money also must be returned:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover It back, and it is against conscience to retain it: … If indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive

A

> all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.

B

[35] This principle had received strong support from the Privy Council in *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49. In that case, one Bauer was a customer of the appellant bank. He drew a $5 cheque upon his bank. The word 'five' was written but a considerable space was left between that C word and the next words printed on the cheque. On the date of the cheque, Bauer took it to the appellant bank and got it marked or certified by the respondent bank's stamp. After that, he took it away with him and proceeded to write in the word 'hundred' after the word 'five'. The cheque then appeared to be certified for $500. There was no doubt that the condition of the cheque D afforded the opportunity for the fraudulent alteration. Bauer took the cheque as altered and took it to the appellant bank where he opened an account with that altered cheque. The cheque was placed to his credit and Bauer proceeded to draw from that account with that amount in credit. The altered cheque in the meantime went through the clearing process and was cleared without E incident. The fraud was not discovered till a day later. The respondent bank immediately gave notice to the appellant demanding a repayment of $495, being the amount paid by them in respect of the cheque less the $5 for which it was drawn and certified. There was no settlement and the action was brought to recover the $495. Three principal defences were launched:' … namely, first, F because the Bank of Hamilton was negligent in marking the cheque with a blank in it; second, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account; third, because notice was not given to the Imperial Bank of Canada on January 27, the day on which the cheque was paid.' In other words, the appellant alleged that it was the G respondent's negligence which facilitated the fraudulent insertion and although in possession of all material facts before them, failed or abstained from consulting their own books on presentation of the cheque which would 'at once' have disclosed 'the real facts'. At p 56 Lord Lindley speaking on behalf of the Privy Council and in dismissing the appeal, said:

H

> As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on 27 January it had the means of ascertaining from its own books that the cheque had been altered. But means of knowing and actual knowledge are not the same; and it was long ago decided in *Kelly v Solari* that money I honestly paid by mistake of facts could not be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and Their Lordships consider it applicable to the present case. There was nothing on the face of the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover, even if negligence in this respect could be imputed to the Bank

of Hamilton, such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That had been done already. These were the reasons which induced the courts below to decide against the second ground of defence; and Their Lordships have no hesitation incoming to the same conclusion.

[36] It is noteworthy to observe that these cases just examined were in fact discussed in *National Westminster Bank Ltd v Barclays Bank International Ltd and another* [1974] 3 All ER 834. The issue under consideration there was whether a bank which had dishonored an apparently genuine cheque on which the signature of its customer was in fact skillfully forged can recover the money from the payee of the cheque after he has acted to his detriment in direct reliance on the cheque having been honoured. After examining the decisions in *Kelly v Solari, Cocks v Masterman*, *The London and River Plate Bank, Limited v The Bank of Liverpool, Limited, and others* and *Imperial Bank of Canada v Bank of Hamilton* cases identified, Kerr J came up with several propositions, including the following:

(a) that the bank owes no duty of care to the payee when considering whether to honour a customer's cheque where the form is proper and the customer's signature appears genuine;

(b) that ' … the law should be slow to impose on an innocent party who has not acted negligently an estoppel merely by reason of having dealt with a forged document on the assumption that it was genuine'.

(c) that the mere fact that the defendant has acted to its detriment by spending or paying away the money in reliance on having received the payment is not sufficient to bar the plaintiffs right to recover;

(d) that the mere payment on a forged cheque did not imply any representation by the plaintiff that the cheque was genuine so as to form the basis for the operation of the principle of estoppel against the plaintiff nor is it a bar to recovery under a mistake of fact.

[37] In laying down those propositions, His Lordship also recognised that there are exceptions to the rule that a plaintiff is entitled to recover money paid under a mistake even if there were means of discovering the mistake and even though the status quo of the defendant cannot be restored. At p 852, Kerr J described that this would be where ' … the plaintiff represented to the defendant that he might treat the money as his own, or if he was under a duty as against the payee to inform of the true state of account between them, or if the mistake was in some way induced or contributed to by the payee …' A similar analysis was conducted by Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd and another* where His Lordship then opined that a person who has paid another under a mistake may lose the right to recover

where the payer intends the payee to have the money at all events, whether the fact is true or false; or the fact has been deemed in law so to intend. That right is also denied where there is good consideration, especially in discharging a debt owed; or there has been a change of position in good faith; or is deemed in law to have done so.

[38] The position locally is the same. In *Bank Bumiputera (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262, Nik Hashim J (as His Lordship then was) similarly opined that ' … neither the knowledge by the bank of the insufficient funds in PW4's account to cover the cheque nor the mistake due to the negligence of the bank in paying the cheque is a bar to the bank's claim under s 73 and under the common law on 'money had and received'. At p 271, His Lordship was clear that 'It is settled law that in an action for the recovery of money paid under mistake, the bank's negligence is irrelevant. Further on at page 272, His Lordship unequivocally found that 'In the particular circumstances of this case, it is not right for the respondent to keep the money. He is bound by the ties of natural justice and equity to refund the money to the bank. There is no evidence to show that the respondent has altered his position in a manner rendering it inequitable that he should repay the money'. In such a circumstance, His Lordship had clearly opined the settled position that for a claim grounded in payment paid under a mistake, the issue of negligence on the part of the plaintiff is irrelevant.

[39] From the first defendant's submissions, it is quite apparent that the first defendant too, is not advocating that there can never be refund where such monies had been paid under a mistake. That will surely conflict with the clear statutory enunciation of what is the settled principle under both common law and statute; that there must be refund or repayment. However, it cannot be disputed that the right to require a refund can be denied in certain limited circumstances, particularly where there is estoppel, or where innocent third parties are involved, or when there has been a change of position on the part of the innocent party. The circumstances are not limitless and neither is it finite. Even in *Lipkin Gorman (a frim) v Karpnale Ltd* at p 580, Lord Goff of Chieveley was cautious that the defence to actions of restitution should be allowed to develop 'on a case to case basis, in the usual way. It is of course plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer'. To sum up, in the absence of evidence suggesting any of the following (the list is by no means exhaustive), the recipient of monies paid under a mistake must return such monies:

(a) where the money is intentionally paid regardless of the truth and the recipient is to retain the money in any event;

(b) where there is good consideration; or

(c) where there has been a bona fides change of position.

[40] I have carefully scrutinised and weighed the facts, both oral and documentary evidence, and considered the submissions of both counsel on this issue. Upon so doing, I agree that there are serious concerns as to the way DW3 or Pyramid Triways conducted the relevant transactions, particularly in the issue of a receipt or acknowledgment. But, that is with regards Leong/Wong. Reasonable conduct especially where large sums are involved would surely require an issuance of such a receipt or acknowledgment. Yet, none was asked and none appears to have been offered. While this is somewhat unusual, it is insufficient to construe collusion or mala fides on the part of DW1 or the first defendant with DW3 or Pyramid Triways. If there is any impropriety, it would be on the part of DW3 who is however, not a party to the present proceedings. On the other hand, the first defendant is a party. It is difficult in these circumstances for the court to impute the act or conduct of DW3 on DW1 and thereby the first defendant. The first defendant's dealings were with Pyramid Triways and not with Leong/Wong; and Leong/Wong's dealings were with Pyramid Triways or DW3 and not with the first defendant.

[41] Be that as it may, with respect, I disagree that the first defendant was a mere conduit or innocent bystander unaware of the happenings at DW3's end. The first defendant was a party to transactions which were very much part and parcel of its business existence. It certainly derived benefit in that it received payment for the transaction. That payment would undoubtedly involve an element of profit for the exchange purchases that the first defendant had contracted with Pyramid Triways. As far as the first defendant is concerned, it was supposed to receive payment from Pyramid Triways. It did not. The payment was from Xian Jiang who played no part in the transactions and had no intention to pay or have any obligation, legal or otherwise to pay the first defendant. To allow the first defendant to retain the monies would, in my mind, undoubtedly give the first defendant monies to which it had no right to, amounting to an unjust enrichment. In such circumstances, I do not find any alteration of its position such as to deny the remedy sought or the presence of consideration.

[42] In contrast, I find that not only is there no evidence but no suggestion by the plaintiff to the first defendant that the money paid into its account may be treated as the first defendant's. Just because the plaintiff paid into the first defendant's account does not amount to representation that the monies paid in were or are the first defendant's. The doctrine of estoppel is therefore not

engaged. Further, I agree with learned counsel for the plaintiff that the sale to Pyramid Triways or DW3 of the foreign currencies is not a bar to this claim. The sale of the foreign currencies does not spell a change in position and the first defendant has not given or parted with the monies received to a third party who is bona fide and from whom he cannot seek a refund. The elusive Leong/Wong is obviously not an innocent party.

[43] I am satisfied that the monies were paid into the first defendant's account under the influence of a mistake and upon the supposition that Xian Jiang intended the first defendant to be paid. It is clear that had the true facts been known, such payment would not have been made. In such circumstances, those monies paid may be recovered. This is regardless of how careless or negligent the plaintiff may have been in inquiring into the truth of the mandate to pay the first defendant. In fact, it may also be argued that the payment into the first defendant's account was one without the requisite mandate of Xian Jiang. So, not only did the plaintiff not intend the first defendant to receive the monies, it is not in dispute that Xian Jiang has no relationship with the first defendant. Clearly, Xian Jiang could not have and did not intend the first defendant to have or retain the monies received. Bearing in mind that Xian Jiang is not a customer of the first defendant, there is absolutely no reason for Xian Jiang to be paying the first defendant any money. In fact, the party that owes the first defendant is actually Pyramid Triways as it is the party that bought the foreign currencies from the first defendant on all three occasions; not Xian Jiang. Leong/Wong may have paid the monies into the first defendant's account in the manner described by DW1 and DW3; he nevertheless bought from DW3 or Pyramid Triways, not from the first defendant.

[44] The plaintiff is further not under a duty to inform the first defendant as to the true state of the account between them since the first defendant is not its customer. Certainly, there is evidence that the mistake was in some way induced or contributed to by the first defendant by the way it conducted its business where it allowed third parties to make direct payments into its account in transactions involving itself and Pyramid Triways. Strictly speaking those monies ought to have been paid to Pyramid Triways who will in turn, pay the first defendant. In any case, the mere fact that the plaintiff paid on a forged form does not imply any representation that the form was genuine nor does it amount to negligence.

[45] In the circumstances, the first defendant is not entitled to retain the monies mistakenly paid into its account and the plaintiff is entitled to a repayment of those monies. For the sake of completeness, it is observed that the transactions in question not being that involving negotiable instruments, the decisions in *Cocks v Masterman* and *The London and River Plate Bank* have no

application.

MONEY HAD AND RECEIVED

[46] Finally, the plaintiff's claim is founded on the basis of money had and received. In *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57, where the decision of Gunn Chit Tuan J (as His Lordship then was) was set out, the Supreme Court refused to interfere in His Lordship's decision as it was not convinced 'that the learned Judge has erred in law or in fact in coming to his decision'. In his decision, Gunn Chit Tuan J had referred to the submissions of the plaintiff's counsel who cited several authorities in support of his arguments for repayment of monies. Those arguments may be said to have found favour with the Supreme Court. At p 64, Gunn Chit Tuan J said:

> Next, on money had and received, counsel referred to the views of Lord Haldane LC speaking for the judicial committee in *Royal Bank of Scotland v Rex* when he said:
>
> It is a well established principle of the English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use.

[47] It is beyond dispute that the monies in question belong to Xian Jiang who never had any intention that the first defendant was to receive those monies or having received them, keep those monies. Xian Jiang never applied to remit any monies to the first defendant as they have no dealings with the first defendant. The witnesses from Xian Jiang, PW2, PW3 and PW4 had all confirmed that they also do not know the first defendant. From the testimony of DW1, it may also safely be concluded that the first defendant was not claiming that it was dealing with Xian Jiang. It was dealing with Pyramid Triways. In such circumstances, there was no mandate for the plaintiff to pay Xian Jiang's monies to the first defendant. That being so, I agree with the submissions of learned counsel for the plaintiff that since neither Xian Jiang nor the plaintiff had ever intended the first defendant was to keep and use the monies received which was not the first defendant's in the first place, the first defendant must return those monies to Xian Jiang, or to the plaintiff.

CONCLUSION

[48] In my judgment, after evaluating and deliberating on all evidence led, testing the oral and documentary evidence against each other, and having fully considered all the oral and written submissions put forward by both counsel, and for the reasons already highlighted above, I am satisfied that the plaintiff

has proved its claim on the balance of probabilities. Accordingly, I allow the plaintiff's claim with costs of RM50,000.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan